FEDERALLY SPEAKING

by Barry J. Lipson

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LIBERTY'S CORNER

Keep America Safe and Free! In the October 2002 ***Federally Speaking*** column we reported that "so far" George Washington Law Professor Jeffrey Rosen has given American Society, though not the current **Administration,** a passing grade in protecting our liberty. "So far," he advised, "in the face of great stress, the system has worked relatively well. The **Executive Branch** tried to increase its own authority across the board, but the **Courts** and **Congress** are insisting on a more reasoned balance between liberty and security." The **American Civil Liberties Union (ACLU)**, however, is concerned with what it characterizes as the **Administration's "'Just Say No' policy — no judicial review, no counsel, no public disclosure, no open hearings, essentially no due process"** (emphasis added). It believes that without a broad grass roots involvement, these ongoing "anti-liberties" actions of the **Executive Branch** will seriously erode our hard won liberties. Therefore, the **ACLU** has launched nationally "**Keep America Safe and Free, The ACLU Campaign to Defend the Constitution,**" with an initial funding of $3.5 million. This campaign will focus on keeping the "American people [informed] of actions taken by the **Administration** and **Congress** that have the effect of unnecessarily restricting **free speech**, withholding **due process**, or challenging the **right of judicial review**," including, for the first time in it's over eighty-year history, airing TV "infomercials," these showing the **Attorney General** re-writing and cutting-up the **Constitution** to implement the Administrations "**Just Say No**" policies. This campaign will also monitor the implementation of the **USA Patriot Act;** file civil liberties lawsuits in state and **federal courts**; lobby local and state jurisdictions in specific areas of civil liberties; and organize pro-civil liberties activities at the grass-roots level. (See also ***"Outer Limits?"*** in the ***Federally Speaking*** Extra Issue of November 29, 2002.)

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FOOTNOTED IN MOUTH DESEASE! What if any action should be taken against an **Officer of the Court** who maligns a Court or a member of a Court in a filed or published document? For instance, what about writing: 1) "Seldom has an opinion of this court rested so obviously upon nothing but the personal views of its members;" or that a justice's views are "irrational" and "cannot be taken seriously?" 2) That a study "discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases?" 3) That an "opinion is so factually and legally inaccurate that one is left to wonder whether the court of appeals was determined to find for appellee" and "said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)?" 4) Any of the many sharply barbed and gory attacks by **Officers of the Court** and **Members of the Bar** on various **U.S. Supreme Court** decisions, including ***Brown v. Board of Education,*** 347 U.S. 483 (1954) and ***Bush v. Gore,*** 531 U.S. 98 (2000)? Are these instances of constitutionally protected **First Amendment** free speech "within

the broad range of protected fair commentary on a matter of public interest," and/or merely forms of "rhetorical hyperbole incapable of being proved true or false," as dissenting Indiana Supreme Court Justices Frank Sullivan Jr. and Theodore Boehm found in ***In Re Wilkins,* Case No. 49S00-0005-DI-341** (October 29, 2002), with regard to one of these instances; or would these be "scurrilous and intemperate attack[s] on the integrity of the court" (***Michigan Mutual Insurance Company v. Sports Inc***., 706 N.E.2d 555 (Ind. 1999)), mandating sanctions against the offending individuals? For your information, the first are examples of the comments of **U.S. Supreme Court** Justice Antonin Scalia in his published opinions in ***Atkins v. Virginia,*** __U.S.__, 122 S.Ct. 2242 (2002) (death penalty), and in ***Webster v. Reproductive Health Services,*** 492 U.S. 490 (1989) (referring to fellow Justice Sandra Day O'Connor), respectively. The second is a report of a judicial survey appearing in the regular November 2002 ***Federally Speaking*** column. The third is the "scurrilous and intemperate" or, perhaps, **constitutionally** protected, footnote of Michael Wilkins, Esq. from ***Michigan Mutual, supra***, sanctions for which were affirmed 3-2 ***In Re Wilkins***, under the Indiana version of ABA Model Rule of Professional Conduct 8.2. And the last is what Justice Boehm found this offending footnote to be similar to in his ***Wilkins*** dissent. Then, too, should Justice Robert Rucker, a member of both the majority in ***Wilkins*** and the lower court panel Wilkins chastised, have also participated at the higher level? If the Indiana Supreme Court does not reconsider, the **First Amendment** protected speech issue may yet reach the **U.S. Supreme Court,** which has already "made it clear that 'disciplinary rules governing the legal profession cannot punish activity protected by the **First Amendment**.' ***Gentile v. State Bar of Nev.***, 501 U.S. 1030, 1054 (1991)" (**Wilkins dissents, supra**). One wonders as to the affect of Justice Scalia's utterances then, or who after the dust clears will have one's foot in one's mouth.

DIGITAL WARS AND FAIR USE. **The Digital Media Consumers Rights Act of 2002 (DMCRA)** was recently introduced in **Congress** by Representatives Rick Boucher (D-VA) and John Doolittle (D-CA), as a counterattack in the "Digital Media Wars," to preserve the time-honored **Doctrine of Fair Use** in the field of technologically "protected" digital/electronic works, and to permit the circumvention and bypassing of technological protection measure that allegedly have annihilated "fair use" in this battlefield. The aggressor, according to this Bill's proponents, the "Entertainment/Recording Industry," purportedly had such "fair use" outlawed through its massive lobbying campaign, which brought about the 1998 enactment of the **Digital Millennium Copyright Act (DMCA).** "We all employ the **Fair Use Doctrine** in everyday life," advised Rep. Boucher. "From the college student who photocopies a page from a library book for use in writing a report to the newspaper reporter who excerpts materials for a story, to the typical television viewer who records a broadcast program for viewing at a later time. … The **Fair Use Doctrine** was fashioned by the **federal courts** as a means of furthering the vital free expression values that are given constitutional recognition in the **First Amendment**. … It permits limited personal non-commercial use of lawfully acquired **copyrighted** material without the necessity of having to obtain the prior consent of the owner of the **copyright**," such as the use of this quote here, if the Representative's remarks had been **copyrighted**. He further contends that the "unfairness" of this crippling of the **Fair Use Doctrine** has already surfaced in litigation and threatened litigation forays, citing ***Elcomsoft*** and ***Felten***. In ***U.S. v. ElcomSoft and Dmitry Sklyarov***, a Russian software manufacturing company is being prosecuted before a federal court in the United States" on criminal charges for making software that enables the lawful owner of an electronic book "to make a back-up copy," or which can be used where there is a "malfunction, damage or obsolescence" (exceptions under the DMCA), because the software must circumvent "the technical protection measure guarding access to the text of the electronic book." While Adobe, the producer of the subject "e-books" who handed the **FBI** the case on a "cyber-platter," has abandoned its civil suit, the Government has advised your columnist that it will continue the criminal prosecution in the **U.S. District Court for the Northern District of California** of ElcomSoft (though not of defendant Dmitry Sklyarov, the Russian programmer the Government had arrested and indicted when he visited the U.S., if he continues to cooperate). In ***Felten, et al. v. RIAA, SDMI, Verance Corp., John Ashcroft, in his Official Capacity as Attorney General Of the U.S., et al.*** (DCNJ, CV-01-2669GEB), Edward W. Felten, a

"tenured professor of computer science" at Princeton University, and a key Government witness in ***U.S. v. Microsoft*** (his testified about software he developed to remove the Microsoft web browser from the MS Windows operating system), "enters a contest to defeat watermarking technology that will be used to protect against the redistribution of audio content" and "discovered that digital watermark technology under development to protect music sold by the recording industry has significant security vulnerabilities. The recording industry, represented by the **Recording Industry Association of America (RIAA)** and the **Secure Digital Music Initiative (SDMI) Foundation**, threatened to file suit in April 2001 if Felten and his team published their research at a conference," reported the **Electronic Frontier Foundation**. Felten thereupon sought a **Declaratory Judgment** in the **U.S District Court** in New Jersey against **RIAA, SDMI**, **Attorney General Ashcroft** and others, based upon **First Amendment** free speech rights, and only abandoned this litigation when defendants agreed not to bring legal actions under the **DMCA** for making this research public. Ironically, the threat of suit was made "by the very organization that sponsored the contest." It appears likely that a hotly contested key battle in these Digital Wars will be fought on **Capital Hill** next session. Hopefully, "fairness" and the **Constitution** will prevail.

FOLLOW-UP

MICRO-SPONTE. U.S. District Judge Colleen Kollar-Kotelly, of the **D.C. District**, found that the settlement in ***U.S. v. Microsoft,*** Civil Action Nos. 98-1232 and 98-1233, was not in the public interest unless the Court could act "***sua sponte,"*** meaning the Court must retained jurisdiction to "pursua" Microsoft spontaneously, and, thus, retain the power to "voluntarily" and of its "own accord," monitor the effectiveness of and "tweak" the settlement "without the litigants having presented the issue for consideration." That's what she said and meant when she only conditionally approved the settlement on November 1, 2002, pending the addition of such provisions. "One of the more salient concerns raised in the comments is the fact that neither Microsoft, nor the government, are obliged under the proposed decree to report to the Court regarding Microsoft's compliance with the decree. Compounding this omission from the decree is the limited nature of the clause specifying the degree to which the Court retains jurisdiction." The Court continued, Section VII of the proposed settlement "does not clearly vest the Court with the authority to act ***sua sponte*** to order certifications of compliance and other actions by the parties. Such a circumstance is not acceptable to the Court. The Court considers it imperative, in this unusually complex case, for the Court's retention of jurisdiction to be clearly articulated and broadly drawn. Such clarity and broad reservation of power are necessary to ensure that the Court may require action of the parties when it deems appropriate and need not wait for the parties to file a motion before action is taken. … Accordingly, out of an abundance of caution, the Court will condition its approval of the consent decree pending an alteration to § VII which makes clear that the Court may take appropriate action regarding enforcement of the decree on its own volition and without prompting by the parties. In the presence of such a provision, there will be no doubt that the Court may require certifications of compliance, the regular status reporting, and other action by the parties as the Court deems necessary or appropriate." The Court then concluded that the proposed settlement, "although not precisely the judgment the Court would have crafted, with the exception of the reservation of jurisdiction, does not stray from the realm of the public interest." One might suspect that this is not the last act in the "Micro-Sponte" epic, especially as normally the Court would rely on the prosecuting agency to monitor such a settlement.

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The Western Pennsylvania Chapter of the Federal Bar Association, in cooperation with the Allegheny County Bar Association, brings you the editorial column Federally Speaking. *The views expressed are those of the author or the persons they are attributed to and are not necessarily the views of the FBA or ACBA. You may contact the author at: Barry J. Lipson, Esq.,*

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